CLIFFORD CHANCE

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Contentious Commentary

Civil procedure

Stern. But fair?

The late filing of a costs budget leads to a budget of court fees only.

Two bad days last month for The Rt Hon Mr Andrew Mitchell MP. On Tuesday, the Director of Public Prosecutions announced that she wouldn't prosecute the policeman who, Mr Mitchell alleges, fabricated the infamous exchange at the Downing Street gates all those months ago. On Wednesday, the Court of Appeal decided that the late submission of his costs budget in a libel suit against the *Sun* reduced Mr Mitchell's recoverable costs, if he wins, to court fees only.

Except that the second decision doesn't affect Mr Mitchell, which may - or may not - be of significance in understanding its wider application. The Court of Appeal undoubtedly intended to send lawyers an uncompromising message on the need to comply with rules, but that is much easier to do when the only person who suffers is a party's lawyer. Mr Mitchell's action against the *Sun* continues unimpeded. His solicitor may not be paid if he wins, but what are insurers for?

In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1526, a case management conference was called on 12 days' notice. Litigation budgets needed to be filed seven days before the hearing (CPR 3.13). D filed its budget on time, but C only did so on the day before the hearing. Faced with this, the Master applied the sanction in CPR 3.14, ie C was treated as having filed a budget comprising court fees only. The budget effectively caps a party's recoverable costs if it wins (CPR 3.18). C then applied for relief from sanctions under CPR 3.9, but this was refused. (The issues technically arose under a pre-Jackson pilot scheme, but they were treated as if they concerned the Jacksonised CPR.)

The Court of Appeal refused C's appeal against the Master's decisions on his costs budget and seeking relief from sanctions. Both appeals raised the same point, namely in what circumstances should the court give relief from the consequences of late submission of a budget, whether in deciding not to apply the sanction in CPR 3.14 or, subsequently, in dealing with an application for relief from sanctions under CPR 3.9.

The Court of Appeal thumped its metaphorical fist on the judicial desk, and commanded lawyers generally to do as they are told. The key issue is no longer justice in the individual case (the outcome of *Mitchell* was a windfall for the *Sun*) but the overriding objective, the need to conduct litigation fairly and at proportionate cost and, most importantly, the need to comply with the rules. If the breach of a rule is "trivial", then relief should be granted. If it is not trivial, then an explanation will be required. If there is good reason, the court will usually grant relief. Applications for an extension made before a deadline expires will be treated more favourably than later applications.

In *Mitchell*, there was no good reason for the failure to file the budget on time. A small firm being understaffed and overworked did not begin to pass muster. The Master even bounced another hearing from her diary in order to hear quickly the application for relief from her sanction, emphasising the effect of the default in *Mitchell* on other cases. The Court of Appeal was not amused. Relief from sanctions should rarely be given, the Court of Appeal said, reprimanding certain first instance judges for having been too lenient in other cases.

Contents

The Court of Appeal's message is clear with regard to budgets. If you are late with a budget, you are in serious trouble. An urgent application should be made as soon as you fear that you will miss the date. This fierce approach may spread to other costs related matters.

The message is harder to grasp for other situations. If you need to apply for relief from sanctions under CPR 3.9, the Court of Appeal's strictures also apply. But will the court be so unyielding if the claim or defence will be struck out for non-compliance? What is the benefit to the court of moving a claim from, say, the defendant's shoulders to those of the claimant's solicitors' insurers? What if there is no sanction prescribed or an application is made before expiry of a time limit? Will courts be reluctant to make unless orders?

The Court of Appeal ended by saying that its decision was intended to send out a clear message. Once lawyers understood the need to comply with rules and orders, the Court of Appeal averred, satellite litigation as in *Mitchell* would be a thing of the past. Cue scepticism all round. Expect the launch of a thousand satellites following *Mitchell* because the upside arising from the other side breaking the rules and being refused relief is potentially so enormous.

Contract

Penalty try

A clause reducing the consideration payable for shares on breach of contract is struck down as a penalty.

English law favours freedom of contract in commercial situations but, despite this laissez faire philosophy, retains rules striking down contractual terms that are for the prime purpose of deterring breach of contract. The unusual nature of this power is reflected in the problem the courts have in defining precisely when they should intervene on this ground.

But intervene the court certainly did in *Makdessi v Cavendish Square Holdings BV* [2013] EWCA Civ 1539, one of the few cases in which contract terms have been held to be penal (Clifford Chance LLP acted for the successful appellant). D sold shares in an advertising business to C (part of the WPP group) on terms that included deferred consideration. However, if D broke any of the restrictive covenants in the agreement (competing, enticing away clients or employees etc) in any respect, D forfeited all outstanding deferred consideration. Any breach of the covenants also led to D's option to put his remaining shares on C at a price including goodwill being replaced by a call option held by C at net asset value only, a large discount.

The Court of Appeal decided that these were penalty clauses and therefore unenforceable. The Court of Appeal traversed widely over the case law but, when considering the facts of *Makdessi*, started by assessing whether the clauses could be seen as genuine pre-estimates of recoverable loss. This involves heavily fact-specific questions, and the Court of Appeal said that courts should not be too astute to conclude that a clause falls foul of this test. A comparison must be made between the clause and the damages recoverable at common law. If the clause requires payment of more than the maximum possible damages, it will probably be penal, but below that extreme case the position involves rebuttable presumptions, hypotheses, bargaining power, unconscionability and much else of an imponderable nature. The Court of Appeal concluded that the clauses in *Makdessi* were not genuine pre-estimates but were "extravagant and unreasonable" not least because the underlying company retained the right to pursue (and did pursue) D in damages for the same breaches of duty, and C also pursued a parallel claim in damages.

Having belayed this cornice, the Court of Appeal then considered whether there was a commercial justification for the clauses sufficient to render them non-penal. Where that commercial justification might be found for clauses that a court has already said were extravagant and unreasonable is less than clear. Unsurprisingly, the Court of Appeal concluded that there was no such justification. The clauses therefore fell, leaving C to claim its actual loss for breach of the restrictive covenants and *Makdessi* as a good starting point for any consideration of the law on penalty clauses.

Tax

A taxing choice

Banks may have to deduct tax when paying compensation to individuals.

On 1 October 2013, the law was changed to require banks paying compensation to individuals to deduct tax on any interest element in that compensation. This applies whether the compensation is paid pursuant to a settlement or a judgment. The Government's target is to capture part of the sums being paid by banks to their customers for financial misselling, though the rules are not confined to misselling. Individuals who receive compensation for misselling should in any event declare the interest element in their tax returns, but the Government is concerned that some might forget to do so - hence the withholding requirement (which, for some unexplained reason, applied a month earlier to the few remaining building societies).

An exhausting process

Service under a contract is not the same as service under the CPR.

Green J started his judgment in *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2013] EWHC 3261 (QB) by reciting harsh judicial dicta about the need to comply with contractual time limits, commercial certainty being key and there being no place for sympathy in such matters (eg *Ener-G Holdings plc v Hormell* [2012] EWCA Civ 1059). It was therefore inevitable that he would go on to show sympathy. He did. But the moral is never take a risk with notice provisions in a contract. C got away with it, but those involved probably lost a lot of sleep.

Ageas involved warranty claims under an agreement for the sale of a business. As is common, there were two time limits for bringing claims: first, for initial written notice of warranty claims; and, secondly, for subsequently starting court proceedings.

The first notice was fine. This triggered the second requirement of "validly issuing and serving legal process within six months" of the first notice, failing which the claim was deemed withdrawn. The six months expired on Saturday 28 January (weekends always seem to be problematical for time limits). The claim form was faxed, emailed and DXed to D on 26 January. This meant that, under CPR 6.14, the claim form was deemed served on 30 January. Was it in time or out of time?

Green J decided that it was in time. He considered that "served" in the agreement did not carry any CPR meaning because the interpretative audience for the agreement was businessmen, not lawyers. Service therefore meant drawn to D's attention so that D could establish whether or not it had escaped from the claim. D knew about the claim on 26 January, which was in time.

The judge felt bolstered in this conclusion by his view that there are two service regimes in the CPR: CPR 6.14, which deems service to take place on a certain date in order to make it easier work out the dates for subsequent steps (and on which D relied in *Ageas*); and CPR 7.5, which sets the date by which a claimant must take the steps required of it in order to meet any limitation period. The judge considered that there was uncertainty as to which CPR regime to incorporate, which pointed against incorporation. The judge could have said that neither CPR 6.14 nor CPR 7.5 was really a service regime at all or that the more obvious parallel was with CPR 7.5.

Green J also considered that the standard notice provision in the agreement applied to the claim form. It applied to "notices, requests, demands and other communications under this Agreement". The judge thought that a claim form was a communication under the agreement, a conclusion that may surprise some. Despite not quite meeting the requirements of the clause, the judge was satisfied that the substance was met within time.

All round a lenient, though justifiable (on the first ground at least) approach (cf *Mitchell* above), and one that means that the real parties can squabble over the underlying warranty dispute. Best not go there, though.

Homeward bound

The international element required for the Brussels I Regulation to apply is easily found.

The Brussels I Regulation requires a cross-border element to apply - it does not apply if an Englishman sues another Englishman in England. But in *Maletic v lastminute.com GmbH* (Case C-478/12), the Court of Justice of the European Union said, in customarily elliptical manner, that this international element "need not necessarily derive from the involvement, either because of the subject matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States".

The facts in *Maletic* were that the Cs (domiciled in Austria) booked a holiday in Egypt on lastminute.com (domiciled in Germany), which acted as agent for D2 (domiciled in Austria). Having been put in the wrong hotel, the Cs sued both lastminute.com and D2. The Austrian court selected by the Cs had jurisdiction over lastminute.com (article 16(1) of Brussels I) but not, according to Austrian law, over D2, which should have beeen sued elsewhere in Austria.

The CJEU begged to differ. It considered that the two contracts (the Cs with lastminute.com and the Cs with D2) were inseparable. That provided sufficient international element, with the result that Brussels I applied to the Cs' claim against their fellow Austrians. The Cs could therefore rely on article 16(1) of Brussels I to sue D2 in the Cs' home court even though Austrian domestic law did not allow that. The Brussels I Regulation applied in what appeared to be a domestic situation.

Consuming passions

A consumer can commonly sue at home.

A German tourist wanders down Oxford Street and stumbles upon a large department store. The tourist has never heard of the department store, but needs a widget, sees one in the window, so goes in and buys a widget from the shop. The tourist later complains that the widget doesn't work. The store disagrees. Can the tourist sue the store in Germany? The answer may well be yes.

It turns upon article 15(1)(c) of the Brussels I Regulation. This allows a consumer to sue at home if the business in question "by any means directs [its] activities to [the consumer's home] Member State or to several States including that Member State, and the contract falls within the scope of such activities." For article 15(1)(c) to apply, it is not necessary for the contract to be concluded at a distance (*Mühlleitner v Yusifi*, Case C-190/11), nor is it even necessary for the consumer to know that the business is directing its activities to the consumer's home state (*Emrek v Sabranovic*, Case C-218/12). The only requirement is that the business does in fact direct its activities to the consumer's home state. The contract need not be concluded as a result of those activities.

What then constitutes directing activities to a member state? Is a website accessible from another member state enough? On its own, no but it won't take much for a website to have that effect. In *Alpenhof and Pammer* (Cases C-144/09 and C-585/08), the Court of Justice of the European Union gave a non-exhaustive list of factors that might point to this conclusion, including having international phone codes and using a domain name ending .com rather than .uk. So if the store has a website that looks international, even if the store does not do business through that website, the store is likely to be exposed to the risk of suit in a foreign consumer's home state even for a sale from the store's premises to a consumer of unknown derivation.

Forced seizure

A limited view is taken of when causes of action are the same for Brussels I purposes and an expansive view of damages for breach of a jurisdiction clause.

The aim of the Brussels I Regulation is the free movement of judgments within the EU. To achieve this, it is necessary, if at all possible, for there to be only one judgment on any cause of action. The free movement of conflicting judgments would be challenging, to say the least. The lis alibi pendens provisions in article 27 therefore lie at the heart of the Regulation. They provide that where proceedings involve the same cause of action and the same parties, any court other than the court first seised must stay its proceedings. Article 28 goes on that where proceedings are related, ie it is expedient to determine them together to avoid the risk of irreconcilable judgments, courts other than the first seised may stay their proceedings.

But articles 27 and 28 continue to raise difficult questions. In the extraordinary and complex case of *The Alexandros T* [2013] UKSC 70 (the case formerly known as *Starlight Shipping Co v Allianz Maritime & Aviation Versicherungens AG*), the Supreme Court embarked on a detailed exploration of many issues, conveniently taking a view that resulted in the English courts keeping as much of the action as they could and that stymied attempts to subvert exclusive jurisdiction agreements in favour of the English courts.

(If it had all happened in just over a year's time, under the recast Brussels I Regulation the English courts would not have had to engage in such lengthy jurisprudential excursions to achieve this result, but could simply have ploughed ahead.)

The case concerned an insurer's failure to pay out on a lost vessel. The owners sued the insurers in England (as required by the jurisdiction provisions in the insurance contract), alleging that the insurers had sought to persuade the crew to perjure themselves, had spread false rumours about the owners and generally behaved badly. The case settled through a Tomlin order under which the insurers paid the maximum sum due under the insurance contract (though no interest or costs), the court having rejected a claim for damages for late payment. End of story.

Or not. Three years later the owners sued the insurers in Greece for the equivalents of malicious falsehood and defamation on the same facts as had been alleged in England. The insurers lifted the stay on the original English proceedings put in place by the Tomlin order in order to enforce the terms of the settlement, as well as starting a new action. The insurers sought (i) a declaration that the proceedings in Greece breached the jurisdiction provisions in the settlement and insurance contracts, (ii) an order that the owners indemnify the insurers for any liability in Greece, and (iii) a declaration that the claims in Greece had already been settled. The owners argued that both original and new English actions should be stayed under article 27 or 28 of the Brussels I Regulation.

The Supreme Court started with article 27. This only applies if the two proceedings involve the same cause of action, interpreted to mean *la même objet et la même cause* (as the French version puts it). The *cause* is the juridical basis upon which arguments as to the facts will take place, while the *objet* is the end in view in the proceedings. The Supreme Court concluded that neither the jurisdiction nor indemnity claims in England ((i) and (ii) above) had the same cause of action as the claims in Greece. The Greek proceedings involved claims in tort; the English proceedings involved claims in contract. Nor were the proceedings mirror images of each other since the English proceedings assumed that the Greek ones would go ahead (even if the relief in England did seek to nullify any award in Greece). So these aspects of the English proceedings could proceed (and, doubtless, reach their conclusion long before those in Greece).

The Supreme Court had more trouble with the declaration sought that the the Greek claims had already been settled ((iii) above). The majority considered that this too did not involve the same cause of action. But since Lord Mance took the reverse view and Lord Neuberger wobbled, the majority conceded that they could not say that the issue was *acte clair*. The question therefore had to be referred to the CJEU. But the Supreme Court gave the insurers 14 days to abandon this claim in order to avoid the trip to Luxembourg. Absent abandonment, the Supreme Court also referred to the CJEU the question of whether the Greek or English courts were first seised.

Article 28 involves a wider exploration, as well as discretion. The Supreme Court accepted that the English and Greek proceedings were related but, as a matter of discretion, refused to stay the English proceedings. Although there is bordering on a presumption that the second seised of related proceedings should be stayed, the Supreme Court considered that the exclusive English jurisdiction clauses in the insurance contract and the settlement were sufficient to rebut that presumption. The Greek proceedings were an attempt to avoid those clauses, which should not be allowed.

The Supreme Court concluded that, on balance, the English court was first seised, so discretion did not actually come into it. Tomlin orders only stay, rather than terminate, proceedings, so the English court remained seised despite the settlement, resulting stay and subsequent amendment of the claim. However, had it mattered, the Supreme Court would have referred the question to the CJEU for decision.

Again, had it mattered, the Supreme Court would have decided that the shipowners should not have been permitted to take the article 27 point. The shipowners had deliberately not relied on it at first instance, raising it only in the Court of Appeal when they changed legal team. But the shipowners had not issued an application under CPR 11(1) within the time limited for doing so, as a result of which they were debarred by the CPR from challenging the jurisdiction of the court. The Supreme Court considered that the obligation in article 27 on the court to take a lis alibi pendens point of its own motion did not oblige the courts to ignore procedural deadlines. Though again, had it mattered, the Supreme Court would have referred the question to the CJEU.

The Supreme Court therefore took a restrictive view of what the same cause of action is for the purposes of article 27 and asserted the primacy of jurisdiction clauses over article 28. They may also have made it worthwhile exploring whether damages or an indemnity can be claimed for breach of a jurisdiction clause by suing in the wrong place.

Privilege

A caring profession

A client care letter is not privileged.

A client care letter is not in general privileged because it sets out the terms on which a solicitor will give advice to its client, rather than the advice itself or a request for the advice. But if the letter specifies the particular matters on which the solicitor is contracted to provide legal advice, those bits will be privileged and should be redacted. So decided the judge in the First-tier Tribunal Tax Chamber in *Behague v HMRC* [2013] UKFTT 596 (TC).

Passive aggressive tactics work

Respondents who object to an arbitral tribunal's jurisdiction have a choice of remedies after an award is rendered.

If a party objects to an arbitral tribunal's jurisdiction, loses on that point, continues to take part in the proceedings, and loses again, it has a choice of remedies: it may either actively challenge the award or it may passively resist enforcement of the award. This is the position in England.

The Singaporean Court of Appeal has reversed a first instance decision to bring the Singapore approach more in line with the English approach.

In *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, the respondents successfully exercised their choice of remedies to resist enforcement against three of the eight respondents without independently challenging the awards.

The Cs and the Rs entered into a joint venture for the provision of multimedia services in Indonesia. C started an arbitration against R1 to R5 under a Subscription and Shareholder's Agreement for failure to fulfil various conditions precedent, but its main dispute was with R6, R7 and R8, who continued to fund the JV company but were not parties to the SSA. C argued that these parties should be joined to the arbitral proceedings by the tribunal under the powers in Article 24.1(b) of the SIAC Rules of Arbitration 2007 (joinder of other parties with their consent). The tribunal agreed, issuing a preliminary award to that effect.

R6, R7 and R8 resisted the joinder application, but did not challenge the joinder award, and participated in the subsequent proceedings whilst reserving their position as to jurisdiction. The Rs also let the opportunity to challenge four substantive awards pass. It was only when the Cs applied for enforcement of the awards in the Singaporean High Court under section 19 of the Singapore International Arbitration Act that the Rs sought to resist enforcement, claiming that the tribunal lacked substantive jurisdiction. Section 19 can be traced back to the UK Arbitration Act 1950, and permits an award to be enforced with the leave of the court, but does not set out grounds on which a party can resist enforcement. The High Court ruled that there was no explicit right to resist enforcement under section 19 of the SIAA.

The Singaporean Court of Appeal disagreed. Referring to both English case law and the purpose and function of the UNCITRAL Model Law on which the SIAA is based, it decided that the "choice of remedies" approach applied to applications to enforce awards (whether domestic or international) under the SIAA. In practice, grounds for challenging enforcement need to be read into section 19 to give the choice of remedies.

As to the challenge itself, the court considered the issue of joinder afresh, finding that the tribunal's decision to join R6, R7 and R8 was predicated on a mistaken construction of the arbitral rules. Since there was no arbitration agreement between the Cs and R6 to R8, enforcement of the awards against these three respondents should be rejected. C therefore left empty handed.

The tactic of limited participation in the arbitration can be a risky strategy, but it worked in this case.

Dispute not included

A narrow interpretation of arbitration agreement results in a one-stop court shop.

A broad approach is normally taken when interpreting arbitration agreements because it is presumed that commercial parties intend that all disputes between them are to be resolved in one forum. If sensible business people wish to carve out certain disputes, they can say so (*Fiona Trust v Privalov* [2007] UKHL 40). But where parties have provided for both litigation and arbitration, the presumption is rebutted (*Barclays Bank PLC v Nylon Capital LLP* [2011] EWCA Civ 826).

Guidance Investments Ltd v Guidance Hotel Investment Company BSC [2013] EWHC 3413 (Comm) was a case involving sensible business people and multiple dispute resolution fora. C and D entered into an investment management agreement providing that "any disputes arising out of or in connection with an Event of Default" should be referred to arbitration. All other disputes were subject to the non-exclusive jurisdiction of the English courts.

C sued in court for certain fees due under the agreement; D counterclaimed that C had breached the contract and committed gross negligence when spending $25m on land in Cairo for development without checking or registering title. C argued that since gross negligence was an event of default under the agreement entitling D to terminate the agreement, the counterclaims should be stayed in favour of arbitration. The judge disagreed. The arbitration agreement only applied where D purported to terminate the contract by reason of an event of default, triggering a dispute as to whether or not an event of default had occurred. Stay refused – both claim and counterclaim were to be litigated

Ironically, a one-stop shop applied here despite the parties' attempt to avoid that. But it does show the hazards of a split dispute resolution provision. Disputes seldom fit neatly into the boxes chosen by the parties when entering into the contract with the resulting the risk (avoided in this case) of fighting on two fronts.

Courts

Glad tidings

Subsequent proceedings cannot be brought against joint tortfeasors.

If two or more tortfeasors are jointly liable (ie they have committed the same tort), there is only one cause of action against them. At common law, entering judgment against one of them or settling the claim with one extinguishes the cause of action. Since the cause of action has gone, none of the other joint tortfeasors can subsequently be sued. The common law no longer applies to judgments (section 3 of the Civil Liability (Contribution) Act 1978), but it continues to apply to settlements.

The way to avoid this outcome when settling with one joint tortfeasor is not as such to settle the claim but merely to covenant not to sue the relevant joint tortfeasor or, much the same, to reserve the right to sue other tortfeasors. If this is done expressly, no problem. The issue is when will the courts imply a reservation of rights into a settlement agreement. The courts have in recent years regarded the rule on joint tortfeasors as a historical relic or a needless trap for the unwary and thus been eager to imply a reservation of rights. But this position may now be changing by means both direct and indirect.

In *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466, C initially sued two landowners claiming compensation for a fraudulent misrepresentation that had induced C to enter into a contract to buy the land. That case was resolved after 15 days of the trial by a full and final settlement involving a payment by the landowners to C. C then sued the Ds, who were surveyors acting for the landowners, for the same fraudulent misrepresentation. C had flagged before and during the trial that it might do this but still cross-examined the two individual Ds for five days. The Ds applied successfully to strike out the second claim.

The Court of Appeal refused to imply a term into C's settlement agreement with the landowners reserving C's ability to sue the Ds or to construe the settlement agreement as providing for that. The Court of Appeal's reasoning was that the inability to sue other joint tortfeasors follows as a matter of law. The parties were all advised on the settlement by lawyers. The reasonable person would think that the parties understood the legal consequences of their conduct and, therefore, that they intended to bring an end to the dispute as whole, not only with regard to the landowners. It is hard to see why this logic should not apply to any settlement where the parties are advised by lawyers.

The Court of Appeal also struck out the second claim as an abuse of process. This followed from the guidance given in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748. This guidance concerns situations where one party to proceedings seeks to reserve the right to sue in subsequent proceedings either the other party or third parties on claims arising from the same facts. The Court of Appeal said that a party intending to reserve a right in this way should notify the court in the first proceedings of its intention so that the court can make appropriate case management directions to ensure that court resources are properly used and the litigation is conducted efficiently and economically. C had failed to do this. *Gladman* had only settled after 15 days of court time, and the Court of Appeal was not prepared to contemplate a rerun of the same trial but against different parties, some of whom had already endured five days of hostile cross-examination.

This might be thought of as excessive court control over the parties' conduct. Nevertheless, if the courts are now emphasising the use of court time, any case that might be duplicate earlier litigation is vulnerable to this kind of application. However, there will always be a conscious or subconscious merits test - *Gladman* was perhaps at the extreme end - but the risk is there. *Mitchell* in disguise?

General factotums

The line between issues of fact and law is hard to draw.

Section 11 of the Tribunals, Courts and Enforcement Act 2007 allows an appeal from the First-tier Tribunal to the Upper Tier Tribunal on a point of law. This therefore requires the identification of what constitutes a point of law and what constitutes its antithesis, a point of fact. In *R (Jones) v First-tier Tribunal* [2013] UKSC 19, the Supreme Court (obiter) took Humpty Dumpty's approach to this issue.

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean - neither more nor less." "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master - that's all."

The appeal court is the master of what is fact and what is law, and those words mean exactly what the appeal court chooses them to mean. If the appeal court wants to hear an

CLIFFORD CHANCE

appeal, the issue will be of law; if it doesn't, the issue will be fact.

Lord Carnwath (who was the first Senior President of Tribunals) seemed concerned that First-tier tribunals might not be taking a consistent approach to some issues. If those issues were of fact, nothing could be done from on high to impose uniformity. So, said Lord Carnwath, "point of law" should be interpreted flexibly to include any point of principle of general relevance. All comes down to expediency.

It is fair to say that the Supreme Court was not talking about primary facts - who said what to whom etc - but the legal consequences of those facts. One might be grateful to the Supreme Court for exposing the judiciary's true reasoning, but the Supreme Court could have more readily have kept within the boundaries of the legislation by saying that a point of law is anything that is not a matter of primary fact. However, that might have led to an excess of appeals, which the judiciary also wants to avoid. But the outcome is that just because something looks like a fact doesn't mean that you can't appeal.

Ends and means

A party is ordered to prove that it can fund a case through to trial.

A claimant is not entitled to know whether its defendant is good for the money or whether the defendant has insurance. If you sue, you take a chance on the defendant's solvency. So held Thirlwall J in *The PIP Breast Implant Litigation* [2013] EWHC 3643 (QB) in deciding that requests for further information under CPR 18.1 cannot be used as a means to get hold of a defendant's insurance policy. Insurers will be relieved.

But Thirlwall J did order D to prove that it could fund the case until trial. The case was a test case under a group litigation order, with other cases stacked up behind it awaiting the outcome. If D could not fund the case, which therefore collapsed, the court's management of the cases subject to the GLO would be significantly affected. The judge therefore decided that CPR 3.1(m) gave her power to order D to state whether it was adequately insured to take the litigation through to trial because this was necessary for managing the case and furthering the overriding objective (particularly with the post-Jackson emphasis on the efficiency of the court system).

Contentious Commentary is a review of legal developments for litigators

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